Supreme Court, U.S.
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No.

IN THE
UNITED STATES SUPREME COURT

October Term, 1987

SCHUYLKILL COUNTY TAX CLAIM BUREAU AND
SPRUCE CREEK ENERGY COMPANY, INC.,
Petitioners

vs.

TREMONT TOWNSHIP, PINE GROVE AREA SCHOOL DISTRICT,
MINERSVILLE AREA SCHOOL DISTRICT
AND REILLY TOWNSHIP,
Respondents

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Did not the Commonwealth Court of Pennsylvania err, in contravention of the Fourteenth Amendment of the United States Constitution and applicable decisions of this Court, when it:

(a) ruled, *sua sponte*, without rationale and in conflict with longstanding provisions of the Pennsylvania Rules of Civil Procedure and Pennsylvania case law, that Petitioners should not have filed a post-trial motion, following an adjudication on the merits of a civil action by a trial court, and that, therefore, Petitioners' Notice of Appeal was untimely and their appellate rights forfeit;

(b) made its decision on the basis of a fine distinction drawn between certain kinds of cases, which distinction was neither articulated nor unjustified, was vague and irrational, had no basis in law, policy, or good sense, and could not reasonably have been anticipated;

(c) changed by interpretation the civil practice rules retroactively, based upon a precedential case which it had decided in 1986, almost one year after petitioners had filed their post-trial motion and notice of appeal and while they were awaiting their turn to be heard in the Commonwealth Court?

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(b) made its decision on the basis of a fine distinction drawn between certain kinds of cases, which distinction was neither articulated nor unjustified, was vague and irrational, had no basis in law, policy, or good sense, and could not reasonably have been anticipated;

(c) changed by interpretation the civil practice rules retroactively, based upon a precedential case which it had decided in 1986, almost one year after petitioners had filed their post-trial motion and notice of appeal and while they were awaiting their turn to be heard in the Commonwealth Court?

OPINIONS IN THE COURTS BELOW

1. The Opinion of the Commonwealth Court of Pennsylvania, dated March 5, 1987, is reported at 522 A. 2d 102 (1987). A copy of that Opinion is attached hereto as Appendix pp. 1a-12a.

2. The Opinion and Order of the Court of Common Pleas of Schuylkill County, McCloskey, J., dated December 10, 1985, denying the Post-Trial Motions of Spruce

Creek Energy Company and Schuylkill County Tax Claim Bureau, are attached hereto as Appendix pp. 13a-20a.

3. The Opinion and Order of the Court of Common Pleas of Schuylkill County, McCloskey, J., dated September 27, 1985, granting the Petitions of Tremont Township, Pine Grove Area School District, Minersville Area School District and Reilly Township To Disapprove the Sale, are attached hereto as Appendix pp. 21a-31a.

4. The Opinion Order of the Court of Common Pleas of Schuylkill County, McCloskey, J., dated August 27, 1984, denying the Petition of Spruce Creek Energy Company and Schuylkill County Tax Claim Bureau for Change of Venue or Recusal of the Judges, is attached hereto as Appendix pp. 32a-37a.

JURISDICTION

1. The date of the judgment of the Commonwealth Court of Pennsylvania[1] sought to be reviewed is March 5, 1987, which is also its date of its entry. Petitioners promptly filed a Joint Application for Reargument which the Commonwealth Court denied by Order dated May 14, 1987, a true copy of which is attached hereto as Appendix p. 38a. Petitioners thereupon filed a Petition for Allowance of Appeal [from the final Commonwealth Court judgment] with the Supreme Court of Pennsylvania, which was denied *per curiam* on December 3, 1987. A true copy of notice of entry of this Order is attached hereto as Appendix p. 39a. Finally, Petitioners filed with the Supreme Court of Pennsylvania an Application for Reconsideration of Denial of Allowance of Appeal, which that court denied *per curiam* on February 1, 1988. A true copy of notice of entry of this Order is attached hereto as Appendix p. 40a.

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[1] The Commonwealth Court is one of two intermediate appellate courts in Pennsylvania. Its appellate jurisdiction extends, *inter alia*, to disputes involving as parties the Commonwealth or its political subdivisions.

Jurisdiction of this Court to review by Writ of Certiorari the judgment of the Commonwealth Court of Pennsylvania, which is the "highest court of [the] State in which decision could be had" is setforth in 28 U.S.C. Section 1257(3).

The text of the United States constitutional provisions and Pennsylvania statutes and rules of court which this case involves are to be found in Appendix pp. 42a-47a.

STATEMENT OF THE CASE

A. The Hearing

On March 24, 1983, Petitioners, Spruce Creek Energy Company, Inc. ("Spruce Creek")[2] and Schuylkill County Tax Claim Bureau (the "Bureau"), entered into a "Private Land Sale Agreement" (the "Agreement") by which Spruce Creek obtained an option to buy certain property held by the Bureau as a result of real estate tax foreclosures. By virtue of the Agreement, Spruce Creek gained an equitable interest in substantial anthracite coal reserves located 500 feet below the surface of approximately 6,500 acres.

In accordance with the Pennsylvania Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. Section 5860.101 *et seq.* (the "Tax Sale Law"), local taxing authorities were notified of the Agreement. Certain of these authorities—Tremont Township, Pine Grove Area School District, Minersville Area School District and Reilly Township, respondents herein—instituted an action in the Court of Common Pleas[3] of Schuylkill County, pursuant to Section 613(a) of the Tax Sale Law, 72 P.S. Section 5860.613(a), to defeat the sale.

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[2] Spruce Creek Energy Company, Inc. has neither parent company, subsidiaries nor affiliates.

[3] The Court of Common Pleas in Pennsylvania is the court of general jurisdiction.

While this action was pending, a non-binding referendum was held, and the voters of the County voted overwhelmingly in opposition to the "burning of anthracite coal underground" (the method by which Spruce Creek proposed to extract the deep coal energy). Thereafter, Petitioners, arguing that the trial court stood in danger of being overwhelmed by the political nature of the controversy, filed a motion for Change of Venue or for Recusal of the Judges of Schuylkill County. The order of the court and its opinion denying that motion are attached hereto as Appendix pp. 32a-37a.

The trial court went on to adjudicate the merits of the case. Over a period of five days, lay and expert witnesses were sworn, heard and cross-examined. The testimony explored among other things, the circumstances surrounding the negotiation of the Agreement and questions of engineering feasibility and safety. Many tangible exhibits were received in evidence. In sum, the proceeding appeared to any observer to be a hotly contested trial.

On September 27, 1985, the trial court, per McCloskey J., determined the Agreement to be invalid. The order and the opinion of the court to this effect are attached hereto as Appendix pp. 21a-31a. Petitioners then filed a timely post-trial motion in the nature of exceptions to the judgment or a request for reconsideration in the good faith belief that this step was a necessary procedural precursor to an ultimate appeal to the Commonwealth Court.

B. The Status of Pennsylvania's Procedural Rule Regarding Post-Trial Motions When Petitioners Filed Their Motion

In 1985, and, indeed, even now, Rule 227.1 of the Pennsylvania Rules of Civil Procedure (the "Procedural Rules") provided, in pertinent part, that:

(c) Post trial motions shall be filed within ten days after

* * *

(2) notice of non suit or the filing of the decision or adjudication in the case of a trial without jury or equity trial.

Further, Local Rule 227.1 of the Court of Common Pleas of Schuylkill County was even broader in apparent scope:

"Post-Trial Motions":

(a) Motions for new trials, for judgment n.o.v., to take off non-suits, in arrest to judgment, *and exceptions to a decision or adjudication in a non-jury proceeding* with the reasons in support thereof, shall be in writing and shall be filed within ten days after the verdict, non-suit, or adjudication. . .

[emphasis added]

Case law had made very clear to the attorneys of Pennsylvania that the filing of Post-Trial Motions was a prerequisite to the filing of an appeal.

> We discern no reason here for departing from the settled principle that no appeal will lie from a decision of the trial judge sitting without a jury unless exceptions are filed in the Court below and disposed of there. Pa. R.C.P. No. 1038. . .[4]
>
> *Lundvall v. Camp Hill School District*, 362 A. 2d 482, 484 (Pa. Cmwlth. 1976).

This Rule was set out again with clarity and force in *City of Allegheny v. Allegheny City Prison Emp.*, 417 A. 2d 864, 865 (Pa. Cmwlth. 1980).

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[4] Rescinded Pennsylvania Rule of Civil Procedure 1038(d) was the precursor of Rule 227.1 for bench trials. *Commonwealth v. Willowgrove Veterans Home Ass'n.*, 509 A.2d 958, 960 (Pa. Cmwlth. 1986).

There was *nothing* in Pennsylvania's jurisprudence to suggest that the requirement of filing post-trial motions as a prerequisite to an appeal did not or would not persist in all civil cases brought in the Court of Common Pleas. Every signpost in the Procedural Rules pointed to the prescribed course. Pa. R.C.P. 52(c) provided that the Rules applied to all pending and future "actions". Pa. R.C.P. 1001(b)(1) provided that there would be but one form of action to be known as a "civil action", with procedural distinctions between trespass and assumpsit cases abolished. Special proceedings were to be treated, unless otherwise specifically stated, in accordance with the general rules for civil "actions". *See* Pa. R.C.P. 1051, 1061, 1071, regarding replevin, ejectment and the action to quiet title respectively. Nothing in those rules respecting actions involving the Commonwealth or its political subdivision, Pa. R.C.P. 2101-2125, touched upon or modified the general rule regarding post-trial motions, Pa. R.C.P. 227.1

A trial attorney in Pennsylvania had every reason to conclude that judicial interpretation of the Procedural Rules would be neither formalistic nor doctrinaire. Thus, Pa. R.C.P. 126 provides that

> [t]he rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa. R.C.P. 227.1 itself falls under the broad heading of "*Business of Courts*", which further supports the inference that all civil "actions" are amenable to post-trial motion practice, particularly in view of the fact that the Procedural Rules do not define "trial" as a term of art.

Prior to 1985, Pennsylvania's appellate courts had carved out an exception from the general rule that

post-trial motions must be filed as a prerequisite to appeal. In *Commonwealth, Department of Transportation v. Hess*, 423 A. 2d 434, 436 (Pa. Cmwlth. 1980); *Commonwealth, Department of Transportation*, 359 A. 2d 838, 839 (Pa. Cmwlth. 1976), and *Appeal of Sgro*, 447 A. 2nd 325, 327 (Pa.Cmwlth 1982),the Commonwealth Court held that the post-trial motion requirement did not apply to proceedings brought under the Pennsylvania Eminent Domain Code or cases involving tax assessments. These cases ostensibly placed Commonwealth attorneys on notice that the enumerated cases constituted "statutory appeals" and that post-trial motions obtained only "when applied by statute or local rule of Court."

Id. at 327. Unfortunately, the term "statutory appeal" was never defined.

In 1984, *Pedersen v. South Williamsport Area School District*, 471 A. 2d 180, 182 (Pa. Cmwlth. 1984), appeared to clarify the meaning of "statutory appeal". Post-trial motions need not be filed in those instances in which the court

> . . . neither heard testimony nor made findings of fact, but rather filed an opinion and order from the basis of the record certified by the agency . . . it is clear that the court was exercising *appellate* review of the agency's decision. [emphasis original]

Thus, in the instant case, all signs pointed unequivocally to the necessity that Petitioners file post-trial motions as a prerequisite to appeal. The Court of Common Pleas of Schuylkill County had "heard testimony [and] made findings of fact". There had been no "record" certified by an agency. This was not a "statutory appeal." Further, in accordance with *Appeal of Sgro, supra*, Schuylkill County's Local Rule 227.1 had, in broad terms, authorized if not required the filing of post-trial motions following, *inter alia*, "a decision or adjudication in a non-jury proceeding. . . ". *Id.*

Additional case law at the time encouraged the scrupulous practitioner to conclude that the filing of post-trial motions would be required in all but the most clearly articulated exceptional situations. In *In Re Wilson*, 449 A. 2d 711, 712 (Pa. Super. 1982), the Pennsylvania Superior Court[5] held that the rules requiring the filing of post-trial motions applied to civil commitment proceedings: "The rules [of procedure] specifically provided that other civil actions are to conform to the assumpsit rules unless a different procedure is expressly mandated." In *Commonwealth Ex Rel. White v. White*, 449 A. 2d 712, 714 (Pa. Super. Court 1982), the court held that the pre-appeal, post-trial motion requirement applied to actions brought under Pennsylvania's Civil Procedural Support Law. "We are bound by these *clear* precedents." [emphasis added] *Id.*

Then, in 1984, in *In Re Jones and Laughlin Steel Corp.*, 477 A. 2d 527, 530 (Pa. Super. 1984), the Superior Court expressed concern that there were "procedural uncertainties" regarding whether or not post-trial motions were to be filed in the case before it. That case involved appraisal proceedings following a merger. The court noted, without disapproval, that the attorneys, in an excess of caution, had filed post-trial motions and simultaneously taken their appeal.

In *Haegele v. Pennsylvania General Ins. Co.*, 479 A. 2d. 1005 (Pa. Super. 1984), the Superior Court had to decide whether an appeal from a trial court's review of an arbitration award should have been preceded by post-trial motions. the court held that such motions were *not* required. However, the court acknowledged the "considerable confusion" on the issue. *Id.* at 1009, n.8.

In *Matter of Borough of Forrest City Abolition*, 482 A. 2d 1375 (Pa. Cmwlth. 1984), the Commonwealth Court decided that an adjudication of a petition to abolish wards need not be followed by post-trial motions.

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[5] The Superior Court is one of Pennsylvania's two intermediate appellate courts.

In *U.S. National Bank in Johnstown v. Johnson*, 487 A. 2d. 809, 813 (Pa. Supreme 1985), the Supreme Court of Pennsylvania ruled that post-trial motions were not to be filed following the grant of preliminary objections. Such a ruling was, it is submitted, in line with established precedent. What was noteworthy was that the court noted "suprisingly" that the Common Pleas Court *en banc* had been clearly confused on the issue and had, wrongly, entertained the post-trial motions.

In sum, as of 1985, in the face of acknowledged procedural confusion, Pennsylvania's appellate courts had failed to delineate a clear rule of post-trial motion practice or to rationalize such a rule. Still, at least one principle appeared to be trustworthy: post-trial motions were to be filed after an adjudication of the merits of any "action" in which the trial court had heard testimony and made findings. It was upon this precept that Petitioners relied.

C. The Continuation of the Proceedings

Following Petitioners' filing of their post-trial motion seeking reconsideration by Judge McCloskey of his Order disapproving the Agreement, neither opposing counsel nor the court suggested that the motion was procedurally improper or in violation of local rule. The court heard and disposed of the motion on its merits some seventy-eight days after its filing. It was denied by Order and Opinion dated December 10, 1985, which is attached hereto as Appendix pp. 13a-20a.

On December 27, 1985, well within the thirty day period for appeal from a final judgment, Petitioners filed their Notice of Appeal in the Commonwealth Court of Pennsylvania. Just short of eleven months later (330 days), the Commonwealth Court heard oral argument. At that time, *sua sponte*, the court raised a question that everyone else had understandably overlooked: had not a post-trial motion been filed erroneously, and thus, while that motion awaited determination by the trial court, had not the thirty day appeal period expired?

On March 5, 1987, the Commonwealth Court dismissed Petitioners' appeal as untimely filed. In so doing, the court observed that

> [l]ocal Rule 227.1 of the Schuylkill County Court of Common Pleas authorizes post-trial motions in the nature of exceptions to a "decision or adjudication in a non-jury *proceeding*". [emphasis original] *We doubt* that this language is intended to encompass statutory appeals; we, therefore, will quash the instant appeal *sua sponte* on jurisdictional grounds. [emphasis supplied].
>
> Appendix Section pp. 46a-47a.

Clearly, the Commonwealth Court harbored doubts as to the validity of its decision. No reason is given nor inference suggested as to why so harsh a result should be appropriate in this case. No effort whatsoever is made to explain why the evidentiary hearing before the Schuylkill County Court did not constitute a "non-jury proceeding" within the meaning of the local rule. Simply, Petitioners are held to be out of time.

The Commonwealth did cite authority—specifically—*Johnston v. Commonwealth, Department of Transportation*[6], 517 A. 2d 585 (Pa. Cmwlth. 1986), in support of its ruling. That decision had been issued by the Commonwealth Court on November 14, 1986, almost one year *after* Petitioners filed their Notice of Appeal and more than one year after they had filed their post-trial motion in the trial court. Thus, Petitioners were cast down by a precedent which had come into being while they were waiting their turn to be heard in

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[6] The *Johnston* decision, itself, continues the confusion. It requires post-trial motions in the case of "statutory appeals" if "authorized by statute or local rule." However, "statutory appeals" are still not defined.

the same appellate court and long after they had committed to a course of conduct which they legitimately believed to be required by both state-wide and local court procedure.

In summarily dismissing Petitioners' appeal, the Commonwealth Court went on to hold that Pa. R.C.P. 227.1 did not apply because "this, then, clearly was a statutory appeal. There was a hearing, not a trial." (Appendix p. 7a). The court made no effort to enlighten as to the difference between a "hearing" and a "trial" and why, to the edification of those with need to know, this distinction made a difference. Interestingly, while insisting that Petitioners had not had a "trial", the Commonwealth Court referred on nine separate occasions in its opinion to the Court of Common Pleas of Schuylkill County as the "trial court".[7]

On March 16, 1987, petitioners applied for reargument in the Commonwealth Court, raising, *inter alia*, their arguments that the application of new case law retroactively to procedures which were proper in 1985 violated the Due Process Clause of the United States Constitution.

On May 14, 1987, Petitioners' Application for Reargument was denied by the Commonwealth Court without opinion. A copy of the Order is appended hereto as Appendix p. 38a.

On or about June 10, 1987, Petitioners filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. Petitioners argued, *inter alia*, that "to change without advance notice the rules of litigation applicable to pending cases smacks of unfairness and offends traditional notions of evenhanded justice," citing the Fourteenth Amendment to the United States Constitution.

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[7] The court went on, by way of dicta, to address the merits of the appeal, and found against Petitioners. The limited *holding* of the case—that petitioners' appeal was out of time—appears to bar review of the *merits* at this juncture by any higher court.

On December 3, 1987, the Petition for Allowance of Appeal was denied without Opinion by the Supreme Court of Pennsylvania. Its Order is appended hereto as Appendix p. 39a. Petitioners' subsequent Application For Reconsideration of Denial of Allowance of Appeal was similarly denied by Order entered on February 1, 1988, which is appended thereto as Appendix p. 40a.

ARGUMENT

I. ARBITRARY, RETROACTIVE INTERPRETATIONS OF PENNSYLVANIA RULE OF CIVIL PROCEDURE 227.1 AND SCHUYLKILL COUNTY TRIAL COURT RULE 227.1 DEPRIVED PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND, FURTHER, DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

A. The Pennsylvania Law Regarding The Filing of Post-Trial Motions Has Been In Disarray.

The Pennsylvania courts continue to express their bafflement as to whether and when post-trial motions should be filed. A review of the case law documents the confusing, confounding, and unfair situation which was faced by Petitioners.

Post-trial motions must be filed in proceedings to enforce Child Support Awards. *Wertz v. Anderson*, 508 A. 2d 1218 (Pa. Super. 1986). They must *not* be filed in matters involving the Pennsylvania Liquor Control Board. *Commonwealth of Pennsylvania Liq. Control Bd. v. Kayden Corp.*, 505 A. 2d 393 (Pa. Cmwlth. 1986), nor in an appeal from a Auditors Report regarding a surcharge. *Appeal of Auditor's Report of Muncy Creek Township*, 520 A. 2d 1241, 1243 (Pa. Cmwlth. 1987). However, they must be filed in an action in mandamus. *Id* at 1243, n. 2.

The term "hearing" continues to be used imprecisely, and the terms "statutory appeal" and "trial" remain undefined in this context. *Johnson v. Johnson*,

515 A. 2d 960, 961 (Pa. Super. 1986.) There is never mention in any of these decisions of judicial reasoning or social policy. There is never an articulated standard. One's right to an appeal turns of an *ad hoc* decision that even the most careful practitioner cannot anticipate with accuracy.

In 1985, the law actually seemed more precise. Local Rule 227.1 of the Schuylkill County Court seemed unequivocally to call for the filing of post-trial motions following an "adjudication in a non-jury proceeding." Therefore, Petitioners had every reason to file post-trial motions. To do otherwise would have courted a malpractice claim. Yet, Petitioners stand stripped of their appellate rights by an *unreasoned* decision created *after* they filed their motion and took their appeal.

From time to time, the Pennsylvania appellate courts do perceive that their dogmatic approach may lead to injustice. In *Burkhart v. Brockway Glass Co.*, 507 A. 2d 844 (Pa. Super. 1986), the Superior Court faced a "conflict between the Pennsylvania Rules of Civil Procedure and the local rule followed in Washington County". *Id.* at 845. In that case, post-trial motions were filed following the grant of a motion for summary judgment. The motions were heard by the Common Pleas Court *en banc*. Even though the subsequent appeal should have been quashed as "untimely" in keeping with precedent, the Superior Court was deferential to the controlling force of local rule:

> It would, of course, be callously unjust to penalize a litigant because her counsel complied with the rule of the forum.
>
> *Id* at 846.

Petitioners believe that it is "callously unjust" to be penalized in this case for following Schuylkill County's local rule, which no person nor decision at the time suggested was inapplicable. Callous injustice and constitutional due process must always be at odds.

In *Commonwealth v. Willowgrove Veterans Home Ass'n.*, 509 A. 2d 958, 960 (Pa. Cmwlth. 1986), the Commonwealth Court underscored the calamitous consequences to the trial lawyer who fails to predict correctly the proper procedure for post-trial motions as later announced by a reviewing court:

> *It is vital that the practitioner of law know when this rule [Rule 227.1] is applicable.* If it is not applicable, and the practitioner files a motion for post-trial relief, the practitioner risks an untimely appeal, because such improper motion will be treated as a petition for reconsideration, which does not stay the appeal period [citation omitted]. If the rule is applicable, and the practitioner fails to file a motion for post-trial relief, the failure to do so precludes consideration of the merits, constitutes a waiver of the appellant's objections, and requires affirmance of the lower court order upon appeal [citation omitted]. Therefore it is imperative that the careful practitioner know when he is required to file for post-trial relief. [emphasis supplied]

Clearly, the Commonwealth Court recognized the confused state of post-trial motion practice in 1986, and yet it declined to clarify the standard in Petitioners' case. Instead, it took an arbitrary and unreasoned approach. Petitioners believe that it is unfair and indecent to penalize litigants for a "doubtful" violation by their attorneys of vague procedural rules which are *later* acknowledged to be in need of clarification. A loss of appellate rights in this context is an extreme punishment which rises to constitutional dimension.

In *East Coast Properties v. Hartford Mut. Inc.*, 516 A. 1207, 1210 (Pa. Super. 1986), the Superior Court, for the first time in all of these cases, addresses this issue from a policy prospective. The court notes with trepidation that litigants might "*unilaterally* extend the appeal period merely by filing exceptions. . . that, of course,

would amount to an impermissible assault on orderly appellate procedure" [citation omitted]. But the problem in Pennsylvania remains that there is still no orderly procedure with regard to post-trial motions. Litigations file or fail to file at their peril.

In *In Re Benner By Cassidy*, 516 A. 2d 59 (Pa. Super. 1986), the Superior Court addressed whether or not proceedings regarding change of name should be followed by post-trial motions. Given Pennsylvania's coin-flip jurisprudence on the subject, one would be hard pressed to predict the outcome (the court decided that post-trial motions were *not* required). In dissenting, Judge McEwen acknowledged a "severe anxiety":

> [S]ince the precise procedure which the majority holds counsel for appellant should have followed, was so uncertain as to present to this appellate tribunal an issue of first impression, I am unable to join in the decision to quash the appeal.
>
> *Id.* at 60-61.

Judge McEwen poses a question involving simple decency. How, without "severe anxiety", can a court penalize a litigant for his counsel's failure to select the safe path through a court-made quagmire? Since their exists in Pennsylvania no articulated, rational standard for determining whether post-trial motions should be filed in a particular case, virtually every unique situation presents an issue of first impression. This lack of guidance was recognized even by the majority opinion, which commented upon the "dearth of case law." *Id.* at 60.

The uncertainty continues. In *Center Township v. Center Township Zoning Hearing Board*, 522 A. 2d 673, 675 (Pa. Cmwlth. 1987), the Commonwealth Court was faced with a situation in which "local practice", although not local rule, required the filing of post-trial motions in

zoning cases. The Commonwealth Court held that post-trial motions were not proper in those cases, but did not foreclose appellate relief:

> Felsing was lulled into believing that his post-trial motion was proper. The issuance of this stay can be considered a break-down in the operation of the court. . . we will hear his appeal *nunc pro tunc*.

Thus, in 1987, the Commonwealth Court, in recognition of the trial bar's confusion, chooses to temper the harshness of a doctrinaire approach with mercy. Petitioners submit that they filed their post-trial motion in accordance with local rule at just about the same time that Felsing did. It is not even-handed justice for the Commonwealth Court to reach opposite results in comparable cases of "break-down in the operation" of the local court. The Commonwealth Court, in Petitioners' case, found certainty in confusion. In so doing, it made the type of ruling that stuns litigants and brings the courts into disfavor.

B. There Is No Reason For Procedural Confusion. The Pennsylvania Courts Can and Should Adopt A Fair and Clear Rule. The Federal Courts Have Done So.

All rules tend to be fuzzy at their edges, but they should not be ambiguous at their centers. It should not be difficult, in light of the federal precedent, for Pennsylvania's courts to construct a clear, even-handed rule regarding the filing of post-trial motions. There is no reason in the world why confusion should still exist.

Federal Rule of Appellate Procedure 4(a)(4) clearly provides, in pertinent part, that the time to appeal "shall run from the entry of the order denying a new trial or granting or denying any other such motions" under Rules 50, 52 and 59]. *See, also*, Supreme Court Rule 20.4. When other situations of procedural uncertainty

have arisen, this Court has been willing to make allowances. Thus, in *Harris Truck Lines v. Cherry Meat Packers*, 371 U.S. 215, ____, 83 S. Ct. 283, 285 (1962), this Court bowed to the trial court's extension of the appeal period upon an erroneous finding of "excusable neglect".

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court.

To the same effect, *see Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, ____, 84 S. Ct. 397, 398 (1964):

> . . . [H]e relied on the Government's failure to raise a claim of untimeliness when the motions were filed and on the District Court's explicit statement that the motion for a new trial was made 'in ample time'; for if any question had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within sixty days of entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions.

See, also, Wolfsohn v. Hankin, 376 U.S. 203, 84 S. Ct. 699 (1964). There is the need in a system of law for "relief from procedural traps," Volume 9, Moore, *Federal Practice*, paragraph 204.12(3), p. 4-80, a need to which the Pennsylvania courts seem totally insensitive.

C. Petitioners' Appellate Right Was Taken From Them Without Due Process of Law: The Applicability of Pennsylvania Rule of Civil Procedure 227.1, and Schuylkill County Local Rule 227.1, As

Interpreted By The Commonwealth Court of Pennsylvania, Was Determined In A Vague And Standardless Manner And Was Given Retroactive Effect.

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. [citations omitted]
>
> . . . Implicit in this constitutional standard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.
>
> *Giaccio v. State of Pennsylvania*, 382 U.S. 401, ____, 86 S. Ct. 518, 520-21 (1966).

"A statute is void for 'vagueness' . . .' which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .'." *Zwicker v. Koota*, 389 U.S. 241, 88 S. Ct. 391 (1967), *citing*, *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 197 ( ). In the instant case, the appellate courts in Pennsylvania were ringing their hands over the confusion regarding Pa. R.C.P. 227.1 long after Petitioners filed post-trial motions in Schuylkill County. A statute or rule of court must give "fair warning". *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 1700 (1964).

In *Bouie v. City of Columbia*, *supra*, which involved a criminal statute, this Court was particularly critical of the state appellate court's effort to establish clarity by judicial gloss after-the-fact:

> Because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language . . .
>
> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of lay 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' . . . 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute.' [citations omitted] *Id.* at 1702-1703.

A new judicial interpretation which is applied retroactively is equivalent to the enactment of laws *ex post facto* and is just as unconstitutional. *Id.* at 1707.

A law must provide an "ascertainable standard of conduct" or it is not law. *Baggett v. Bullitt*, 377 U.S. 360, ____, 84 S. Ct. 1316, 1322 (1964). A law which is "vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176, 73 S. Ct. 189, 190 *cited* in *Cramp vs. Board of Pub. Inst., Orange County, Fla.*, 368 U.S. 278, ____, 82 S. Ct. 275, 281 (1961). A standard that is vague and indefinite is "really no rule or standard at all." *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243, 52 S. Ct. 559, 568, *cited in Cramp v. Board, supra*, at 281.

D. Pennsylvania Rule of Civil Procedure 227.1, As Interpreted In This Case By The Commonwealth Court Of Pennsylvania, Deprived Petitioners Of Rights Guaranteed To Them Under The Equal Protection Clause Of The Fourteenth Amendment.

In 1985, Petitioners followed the dictates of Pennsylvania Rules of Civil Procedure 227.1, Local Rule 227.1 of Schuylkill County, and case precedents which appeared to require or sanction the filing of post-trial motions. In 1987, the Commonwealth Court stripped Petitioners of their appellate rights by giving retroactive effect to a 1986 case,[8] despite the fact that in other cases involving strikingly similar circumstances, it had eschewed so harsh a result. In doing so without adequately rationalizing its classification scheme, the court denied to Petitioners the equal protection of the laws:

> Decisions involving changes in the law may be applied completely retroactively . . . However, if the application chosen does not have some rational basis, announced with reasonable precision, so that the rule may be generally known and its results forecast, it will offend the equal protection clause of the Fourteenth Amendment. Justice must be even-handed. *See Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, . . . Here, it is unclear whether a classification has been made, and also unclear what its basis may be.
>
> *Johnson v. State of Arizona*, 462 F. 2d 1352, 1354 (9th Cir. 1972).

[8] Although not mentioned by the Commonwealth Court in its opinion, that court had decided *for the first time* on January 29, 1986, months after Petitioners had filed the post-trial motion and subsequent notice of appeal, that post-trial motions were not prerequisite to an appeal from a trial court adjudication of a challenge to a proposed sale of tax delinquent property under the Tax Sale Law. 72 P.S. Section 5860.613(a) (the type of proceeding involved in the instant case). *In Re Proposed Private Sale by Carbon County Tax Claim Bureau*, 504 A. 2d 380 (Pa. Cmwlth. 1986).

This Court has held that arbitrary denial of appellate rights is violative of the Equal Protection Clause:

> 'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.' *Griffin v. People of State of Illinois*, 351 U.S. 12, 76 S. Ct. 585 (numerous additional citations omitted).
>
> *Williams v. Oklahoma City*, 395 U.S. 458, ____, 89 S. Ct. 1818, 1819 (1969).

Appellate rights may not be based on an "unreasoned distinction." *Williams v. Oklahoma City, supra*, at 1819.

In *Lindsey v. Normet*, 405 U.S. 56, ____, 92 S. Ct. 862, 876 (1972), this Court reviewed an onerous double-bond prerequisite for filing an appeal in Oregon landlord and tenant litigation. The Oregon Supreme Court had explained that this requirement was necessary in order "to prevent frivolous appeals for the purpose of delay." *Id.* at 875. That court's language rings of the fear, expressed by of the Superior Court of Pennsylvania, that litigants might "unilaterally extend the appeal period." This Court held that the bond procedure was unconstitutional and that it arbitrarily discriminated against tenants in bringing their appeals. Although a state is not required to provide appellate review.

> [w]hen an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. (Numerous citations omitted).
>
> *Id* at 876.

See also, State of Ohio v. Akron Metro. Park Dist., 281 U.S. 74, 50 S. Ct. 228 (1930); *Missouri v. Lewis*, 101 U.S. 22, 30 (1879).

The Equal Protection Clause prohibits distinctions which are "irrational", "irrelevant", "unreasonable", "arbitrary" or "invidious". *Harper v. Virginia State Board of Elections*, 383 U.S. 663, ____, 86 S. Ct. 1079, 1085 (1966).

> "The Equal Protection Clause prevents states from arbitrarily treating people differently under the law . . . The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy (citations omitted)". *Id* at 1089.

In the present case, no Pennsylvania Court has offered to explain what good reason demands that motions for new trial be filed in some cases and not in others; no Pennsylvania Court has offered to tell Pennsylvania practitioners how to predict which case will go which way; no Pennsylvania Court has explained why the recognized confusion over the rule leads in one case to an appeal *nunc pro tunc* and in another case to a quashed appeal or why certain litigants should suffer the application of rules which were created after-the-fact.

> This we do not think is fair play. Penalties impose on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. [Citations omitted]

Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, ____, 43 S. Ct. 55, 60 (1922).

In a quite different context, this Court has held that law enforcement officials, even when involved in the extremely delicate areas of searches and seizures, cannot be found to have offended the law if they

> reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have

> held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.

U.S. v. Peltier, 422 U.S. 531, , 95 S. Ct. 2313, 2318 (1975). "We cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm." *Id* at 2320. In the instant case, counsel conformed their conduct to the prevailing procedural norm. Nothing in Pennsylvania's jurisprudence alerted them to do otherwise.

CONCLUSION

It was wrong, and in violation of the United States Constitution, for the Commonwealth Court not only to articulate an arbitrary, new procedural distinction, but to use it retroactively to deprive Petitioners of a crucial right. The holding of the state court is in conflict with applicable decisions of this Court.

WHEREFORE, for the reasons above stated, Petitioners pray that this Court grant their Petition For Writ of Certiorari.

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APPENDIX

SCHUYLKILL COUNTY TAX CLAIM BUREAU AND SPRUCE CREEK ENERGY COMPANY, INC., *Appellants*	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	
TREMONT TOWNSHIP, PINE GROVE AREA SCHOOL DISTRICT, MINERSVILLE AREA SCHOOL DISTRICT, AND REILLY TOWNSHIP, *Appellees*	NO. 1 C.D. 1986

ORDER

The order of the Court of Common Pleas of Schuylkill County entered August 27, 1984 is affirmed. The Appellants' appeal from the orders of the Court of Common Pleas of Schuylkill County entered September 27, 1985 and December 10, 1985 is dismissed as untimely filed.

Date: March 5, 1987

JOHN A. MACPHAIL
John A. MacPhail, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT

March 5, 1987

Deputy Prothonotary—Chief Clerk

SCHUYLKILL COUNTY TAX CLAIM BUREAU AND SPRUCE CREEK ENERGY COMPANY, INC., *Appellants*	COMMONWEALTH COURT OF PENNSYLVANIA
v.	
TREMONT TOWNSHIP, PINE GROVE AREA SCHOOL DISTRICT, MINERSVILLE AREA SCHOOL DISTRICT, AND REILLY TOWNSHIP, *Appellees*	Argued Nov. 19, 1986. Decided Mar. 5, 1987.

Taxing districts petitioned to have proposed private sale of delinquent tax properties to energy company by the county, county tax claim bureau, and county board of commissioners disapproved. The Common Pleas Court, Schuylkill County, Joseph F. McCloskey, J., disapproved sale. Energy company, the county, the bureau, and the board of commissioners appealed. The Commonwealth Court, No. 1 C.D. 1986, MacPhail, J., held that: (1) appeal was untimely; (2) it was not abuse of discretion to disapprove sale; (3) severability clause could not save purchase agreement; and (4) trial court was not required to fix price below which property could not be sold.

So ordered.

1. Taxation—678

Statutory appeal, which was filed more than 30 days after date of order granting petition of taxing districts to disapprove proposed private sale of delinquent tax properties, was untimely, even though appeal was filed within 30 days of order denying post trial motion for relief; statute under which proceeding had been brought said nothing about post trial motions, and local rule on

post trial motions was not intended to encompass statutory appeals. 72 P.S. §5860.613; Rules Civ. Proc., Rule 227.1 42 Pa. C.S.A.

2. Taxation—678

It was not abuse of discretion to determine that private sale of delinquent tax property by county, county tax claim bureau, and county board of commissioners to energy company was violative of the law; purchase agreement was advantageous to the county but had no benefit whatever to taxing districts. 72 P.S. §§5860.615, 5860.702.

3. Taxation—678

Severability clause in purchase agreement for private sale of delinquent tax property by the county, county tax claim bureau, and county board of commissioners to energy company could not provide basis to uphold any portion of the agreement; whole purchase agreement was tainted with the principal purpose of extricating county from law suit, rather than benefiting taxing districts.

4. Taxation—678

Trial court, which disapproved private sale of delinquent tax property by the county, county tax claim bureau, and county board of commissioners to energy company, was not required to fix price below which property could not be sold; purchase agreement involved 6,500 acres, and trial court found that no bid price had been fixed for the subject tracts in and of themselves due to fact that agreement involved easements and obligations of the county as to real estate not yet subject to tax sale and the discontinuation of federal law suit. 72 P.S. §5860.613.

Richard L. Caplan, Schwartzman & Hepps, Philadelphia, for Spruce Creek Energy Co., Inc.

Joseph H. Jones, Jr., County Sol., Pottsville, for Schuylkill County Tax Claim Bur.

Lanny G. Felty, Pine Grove, Richard A. Adams, Pine Grove, for appellees.

Edward E. Kopko, Pottsville, for Minersville Area School District.

Before CRUMLISH, Jr., President Judge, and CRAIG, MacPHAIL, DOYLE, BARRY, COLINS and PALLADINO, JJ.

MacPHAIL, Judge.

Spruce Creek Energy Company, Inc. (Spruce Creek) and Schuylkill County Tax Claim Bureau (Bureau), sometimes collectively referred to herein as Appellants, appeal from orders of the Schuylkill County Court of Common Pleas which disapproved a proposed private sale of delinquent tax properties to Spruce Creek.

At the heart of the matter now before us is a Private Land Sale Agreement (Agreement) dated March 24, 1983 wherein Schuylkill County (County), the Bureau and the Schuylkill County Board of Commissioners were designated as Grantor and Spruce Creek was designated as Grantee. The essence of the Agreement is that the Grantor therein grants an option to Spruce Creek "to purchase and mine let" certain targeted tracts of real estate totalling approximately 6500 acres held by the Grantor and more specifically described in the Agreement, together with certain easements also more fully described in the Agreement, for an *in situ* coal gasification project. The term of the option is four years. As consideration, Spruce Creek agrees to pay $60,000.00 to Grantor upon execution of the Agreement, of which sum $10,000.00 was to be paid to the County "in its corporate, governmental capacity rather than as Trustee or agent for the tax-delinquent lands" and $50,000.00 each year thereafter during the term of the option. Upon

exercising its option, Spruce Creek is obligated to pay the sum of $2,190,000.00, less any sums paid for the option.

It appears that the real estate in question has been delinquent for tax purposes for many years.

The Agreement states that the Grantor's authority to grant the option is found in Section 614 of the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. §5860.614.

Upon being notified of the proposed sale as then provided in Section 613 of the Law, 72 P.S. §5860.613, the Taxing Districts[1] affected thereby petitioned the court of common pleas to disapprove the sale.

While those proceedings were pending, the County's Board of Elections approved the following non-binding referendum question for the April, 1984 ballot: "Do you approve of underground burning of anthracite coal in Schuylkill County?" The response to the referendum was overwhelmingly negative. Spruce Creek thereupon filed a petition for a change of venue or a recusal of all judges of the court of common pleas contending that the referendum made it impossible for any judge of the trial court, and especially any judge who might have to face the electors in a retention election, to render an impartial adjudication. The trial court, sitting en banc, denied the petition on August 27, 1984.

We will affirm that order on the well-reasoned opinion of Judge McCloskey reported at ____Pa.D. & C.3d ____(1984) (No. S-515-1983, Court of Common Pleas of Schuylkill County—Civil—Law, filed August 27, 1984).

There then followed a series of evidentiary hearings wherein it was disclosed, *inter alia*, that the Agreement was entered into as part of a stipulation for the settlement of a suit instituted in the Federal District Court by Spruce Creek against the County and the Bureau.

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[1] Tremont Township, Pine Grove Area School District, Minersville Area School District and Reilly Township (Taxing Districts).

At the conclusion of the hearings, the trial court entered an order on September 27, 1985 granting the Taxing Districts' petitions to disapprove the sale.

Spruce Creek then filed a post-trial motion for relief pursuant to Pa.R.C.P. No. 227.1 alleging errors on the part of the trial court in its opinion and order of September 27, 1985. The motion was denied by order dated December 10, 1985. Spruce Creek, on December 27, 1985 obtained a final judgment on the orders dated September 27 and December 10, 1985. It filed its appeal to this Court that same date. The Notice of Appeal states that the appeal is from the order of December 10, 1985. In its brief, however, Appellant states that it seeks judicial review of the orders entered December 10, 1985, September 27, 1985 and August 27, 1984.[2]

[1] There is a serious question in our minds as to whether the order of September 27, 1985 is properly before us inasmuch as the instant appeal was filed more than thirty days after that date. In its opinion addressing the "post-trial motion" filed by Spruce Creek, the trial court notes that the motion was filed pursuant to Pa.R.C.P. No. 227.1. That Rule, of course, relates to procedures after a *trial*, whether jury or non-jury. In subsection (c), the Rule requires that such motions be filed within ten days after verdict, discharge of the jury because of inability to agree or nonsuit in the case of a jury trial or, in the case of *trial* without a jury, upon notice of *nonsuit* or the filing of an adjudication or decision.

The proceedings now before us were instituted under and are governed by the provisions of Section 613(a) of the Law, 72 P.S. §5860.613(a), which provided as follows during the time relevant to this action:

> (a) At any time after any property has been exposed to public sale and such sale is not sold

[2] Inasmuch as the August 27, 1984 order was clearly interlocutory, we have addressed that order earlier in this opinion.

> because no bid was made equal to the upset price, as hereinbefore provided, and whether or not proceedings are initiated pursuant to sections 610 through 612.1, the bureau may, on its own motion, and shall, on the written instructions of any taxing district having any tax claims or tax judgments against said property, agree to sell the property at private sale, at any price approved by the bureau. Notice of the proposed sale, stating the price and the property proposed to be sold, shall be given to each such taxing district and to the owner of the property. The corporate authorities of any taxing district, having any tax claims or tax judgments against the property which is to be sold or the owner may, if not satisfied that the sale price approved by the bureau is sufficient, within forty-five (45) days after notice of the proposed sale, petition the court of common pleas of the county to disapprove the sale. The court shall, in such case, after notice to each such taxing district, the owner, the bureau and the purchaser, hear all interested parties. After such hearing, the court may either confirm or disapprove the sale as to it appears just and proper. If the sale is disapproved, the court shall at the same time fix a price below which such property shall not be sold.

This, then, clearly was a statutory appeal. There was a hearing, not a trial. Under similar circumstances, this Court recently held that Rule 227.1 applies to civil actions as defined in Pa.R.C.P. No. 1001 and to statutory appeals "only when authorized by statute or local rule." *Johnston v. Department of Transportation*, ___ Pa.Commonwealth Ct. ___, ___, 517 A.2d 585, 585 (1986). Finding no such statutory authority or local rule applicable, we quashed the appeal as untimely filed.[3] In

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[3] *See also Shultz v. Board of Supervisors of Jackson Township*, 95 Pa.Commonwealth Ct. 550, 505 A.2d 1127 (1986).

the instant case, the statute under which the proceedings were brought says noting about post-trial motions. Local Rule 227.1 of the Schuylkill County Court of Common Pleas authorizes post-trial motions in the nature of exceptions to a "decision or adjudication in a non-jury *proceeding*" (emphasis ours). We doubt that this language is intended to encompass statutory appeals; we, therefore, will quash the instant appeal *sua sponte* on jurisdictional grounds.

Notwithstanding our conclusion that this appeal should be quashed we, because of the importance of this case to all litigants and in the interest of judicial economy, will proceed to address the merits of the appeal in the event it is later determined that we erred regarding our disposition of the case on jurisdictional grounds.

The trial court entered its order of September 27, 1985 disapproving of the sale because it found the Agreement to be "violative and ultra vires of the Real Estate Tax Sale Law." The court held that the Agreement violated the Law in the following respects: (1) the four-year option was in excess of that authorized by Section 614 of the Law, 72 P.S. §5860.614; (2) the provision in the Agreement for the payment of $10,000.00 to the County was contrary to the provisions of Sections 202[4] and 207 of the Law, 72 P.S. §§5860.202, 5860.207; (8) a provision in the Agreement which stated that the County would convey certain easements over surface lands it did not own at the time of the Agreement was executed, was violative of Section 102 of the Law, 72 P.S. §5860.102 and (4) a provision in the Agreement which directed that the Bureau would, concurrent with the execution of the Agreement, execute the deeds conveying the targeted real estate and

[4] We think the trial court meant Section 205 of the Law, 72 P.S. §5860.205, which provided at the time relevant to this action, *inter alia*, that "the" moneys received by the Bureau from the private sale of lands shall be paid over first to the Taxing Districts in proportion to the taxes due them.

deliver them to a bank to be held in escrow pending Spruce Creek's exercise of the option, was violative of Section 615[5] of the Law, 72 P.S. §5860.615, which states that the Bureau shall make its deed when the price for the sale of the land has been finally approved. In its opinion in support of its order denying Spruce Creek's motion for post-trial relief, the court said that since it disapproved the sale as being "procedurally illegal and a nullity" it did not comply with that part of Section 613(a) of the Law which states that if the sale is disapproved, the court should fix a price below which the property could not be sold.

Spruce Creek contends that: (1) the Agreement does not violate the Law; (2) if any of the provisions of the Agreement are invalid the severability clause set forth therein saves the rest of the Agreement and (3) if the Agreement is disapproved, the trial court must set forth a minimum sale price at which the land can be sold by the Bureau.

It is apparent to us that one of the purposes of the provisions of the Law with which we are here concerned is to get real property back on the tax rolls by getting it into the hands of taxpayers on terms that are advantageous to the Taxing Districts. *See Private Sale of County Owned Lands*, 40 Pa.D. & C.2d 301 (1965).[6] In performing its statutory duty, in circumstances such as those present here, the trial court possesses full discretion over the approval or disapproval of any proposed private sale. *McKees Rocks Borough School District Petition*, 360 Pa. 285, 62 A.2d 20 (1948). *See also Baton Coal Co. Appeal*, 365 Pa. 519, 76 A.2d 194 (1950).

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[5] The trial court opinion erroneously refers to Section 515 of the Law.

[6] In *Private Sale of County Owned Lands*, the court said:

> The criterion by which the court is to gauge the merits of a proposed sale is not established as the largest sum which the property will bring, but rather whether the prospective terms of sale satisfy the court that the bargain is proper and to the advantage of all the taxing authorities interested.

Our scope of review, therefore, would seem to be limited to a determination of whether the trial court abused its discretion. We hold that it did not.

[2] Here, the trial court observed that the Agreement was entered into as part of a settlement agreement terminating an action in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 82-5198) brought by Sprue Creek against the county and others.[7] The settlement agreement provided that the County and Bureau would, within twenty days, enter into an option to purchase agreement with Spruce Creek for the subject premises. As we have noted, the Agreement also provided for the payment of $10,000.00 to the County, presumably to reimburse it for costs and counsel fees involved in the Federal suit.[8] All of this indicates that the Agreement is advantageous to the County, but has no benefit whatever to the Taxing Districts.

We do not agree with the trial court that the Bureau is restricted to a one-year option by virtue of the provisions of Section 702 of the Law, 72 P.S. §5860.702, relating to the lease agreements. The provisions of that Section are applicable to real estate purchased by taxing districts and turned over to the Bureau (so-called Article VII Property) rather than property not sold because of insufficient bid (Article VI Property). It nevertheless, was within the discretion of the trial court to determine whether a four-year option was unreasonable in light of the various exploratory privileges granted to Spruce Creek during the option period.

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40 Pa.D. & C.2d at 305-306 (citations omitted).

[7] The action was an anti-trust suit involving lease agreements between the County and parties other than Spruce Creek relating to real property held by the Bureau for delinquent taxes including the subject premises.

[8] Since there is nothing in the Agreement specifying what the payment is for, we cannot say at this time that Section 205 of the Law, 72 P.S. §5860.205, impacts upon that sum, but suffice it to say that no part of the $10,000.00 was ever intended to be passed along to the Taxing Districts.

While the Taxing Districts may have no direct interest in the obligation assumed by the County and Bureau to grant easements over other lands in the possession of or to be acquired by the County or Bureau, the trial court could take this factor into consideration in determining whether the bargain was proper.

Finally, the provision in the Agreement which called for the Bureau to execute and deliver deeds in escrow before the price was approved by the court, clearly violates Section 615 of the Law, 72 P.S. §5860.615. Again, this may not directly affect the Taxing Districts but is another indication in support of the trial court's conclusion that the Agreement was for the advantage of the County/Bureau and not the Taxing Districts.

We are of the opinion that the trial court did not abuse its discretion in holding the Agreement was violative of the Law in the several specific aspects hereinbefore noted.

[3] Regarding the severability clause, the trial court held that inasmuch as the instant suit was not to enforce the contract but rather a statutory proceeding to determine whether the Agreement, if enforced, would be advantageous to the Taxing Districts, Spruce Creek's argument that the remainder of the Agreement was enforceable, was without merit. We are inclined to agree. The whole Agreement is tainted with the principal, if not the only, reason why it was negotiated, to wit, to extricate the County from a law suit. Even though the effect of the Agreement would be to restore the real estate to the tax rolls at least tentatively, the trial court could and did find other factors in the Agreement which militated against the interest of the Taxing Districts.

[4] Section 613 of the Law, 72 P.S. §5860.613, provides that if the court disapproves of a sale, it must then fix the price below which the property cannot be sold. Here, the court disapproved the sale but did not fix a price at which it could be sold. The trial court states that the reason it did not do so is that the provision in the

statute only applies wherein the court finds the bid price insufficient. The court noted that the testimony it heard was not directed to the valuation of the various tracts involved because the Agreement encompassed more than the purchase of the 6500 acres; it involved easements and obligations of the County/Bureau as to real estate not yet subject to tax sale and the discontinuation of the Federal law suit. In sum, the trial court found that no bid price had been fixed for the subject tracts in and of themselves, and there was no testimony in that regard; in effect, there was no bid for the real estate per se.

It appears to this Court that the trial court did properly exercise its discretion and did perform its statutory duty to the extent it was required to do so by virtue of the terms of the Agreement before it.

We, accordingly, would affirm the trial court should the merits of the appeal before us be deemed to be timely filed.

ORDER

The order of the Court of Common Pleas of Schuylkill County entered August 27, 1984 is affirmed. The Appellants' appeal from the orders of the Court of Common Pleas of Schuylkill County entered September 27, 1985 and December 10, 1985 is dismissed as untimely filed.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

TREMONT TOWNSHIP, PINE GROVE AREA SCHOOL DISTRICT, MINERSVILLE AREA SCHOOL DISTRICT, AND REILLY TOWNSHIP, *Plaintiffs*	No. S-515-1983
v. SCHUYLKILL COUNTY TAX CLAIM BUREAU AND SPRUCE CREEK ENERGY COMPANY, INC., *Defendants*	

LANNY G. FELTY, ESQ.—For the Plaintiffs, Tremont Township and Reilly Township
RICHARD A. ADAMS, ESQ.—For the Plaintiff, Pine Grove Area School District
EDWARD E. KOPKO, ESQ.—For the Plaintiff, Minersville Area School District
JOSEPH H. JONES, JR., ESQ.—For the Defendant, Schuylkill County Tax Claim Bureau
RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek

ORDER OF COURT

McCLOSKEY, J.

AND NOW, this 10th day of December, 1985 at 9:00 a.m., it is hereby ORDERED that the post-trial motion for relief filed by the defendant, Spruce Creek Energy Company, Inc., is DENIED.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

TREMONT TOWNSHIP,
PINE GROVE AREA
SCHOOL DISTRICT,
MINERSVILLE AREA
SCHOOL DISTRICT, AND
REILLY TOWNSHIP,
Plaintiffs

v.

SCHUYLKILL COUNTY
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AND SPRUCE CREEK
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RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek

OPINION OF COURT

McCLOSKEY, J.

The defendant, Spruce Creek Energy Company, Inc., has filed a post-trial motion pursuant to Pa. R.C.P. 227.1. In its motion Spruce Creek mixes its grounds and legal argument. It would have been more proper procedure and would have made for a more coherent local argument if Spruce Creek would have filed a brief in

support of its contentions. Counsel is directed to Schuylkill Rule No. 227.1 which specifically refers to briefs.

The defendant, Spruce Creek, first complains that those portions of its "Private Land Sale Agreement" specifically attacked in this Court's Opinion and Order of September 27, 1985,

> ". . . may be stripped from the contract without defeating the bargain, leaving a simple sales agreement which is fully performable and compliant with the Court's interpretation of the Pennsylvania Real Estate Tax Sale Law."

Spruce Creek also complains that the Opinion of September 27, 1985, did not address this contention which Spruce Creek raised at oral argument. Spruce Creek fails, however, to cite any authority to support this contention. The instant action is not one in equity seeking specific performance of a contract; rather, it is one brought by the corporate authorities of taxing districts pursuant to Section 613 of the act.

Spruce Creek next complains ". . . that the enforceability of the Agreement cannot be vitiated solely on the ground that it was negotiated incident to the amicable resolution of an anti-trust suit." No such finding was made in the Opinion and Order of September 27, 1985. The amicable resolution of the defendants' anti-trust suit constitutes a benefit exclusive to the defendant, Tax Claim Bureau, and to the County of Schuylkill, and excluding the other taxing districts who are the plaintiffs in the instant action. The proper disposition of realty tax sale proceeds is addressed in this Court's Opinion of September 27, 1985.

Spruce Creek next complains that at the time of entry of this Court's Order and Opinion of September 27, 1985, a price should have been set on the sale realty. The act does provide that "if the sale is disapproved, the Court shall at the time fix a price below which such property shall not be sold." [72 Pa. C.S.A. §5860.613(a)].

The defendant, Spruce Creek, surely realizes that this provision is in the statutes to cover the situation when a private sale is disapproved because the sale price is insufficient. This Court did not speak to the sufficiency of the price since this alleged sale was disapproved as being procedurally illegal and therefore a nullity. Five (5) days of testimony were offered to the issue of valuation but the testimony was not directed to the issue of valuation as to the various pieces of realty subject to the tax sale proceedings. Moreover, the "Private Land Sale Agreement" at issue encompassed much more than the purchase of various pieces of realty subject to the Schuylkill County Tax Bureau's sale powers: Spruce Creek sought to purchase realty not yet subject to tax sale proceedings; Spruce Creek sought easements over land not subject to tax sale proceedings; Spruce Creek and the then majority County Commissioners and the defendant, Schuylkill County Tax Claim Bureau, sought to settle a dispute before the United States District Court for the Eastern District of Pennsylvania by the sale of said land to Spruce Creek.

Spruce Creek finally complains that there is no legislative prohibition against a four-year option. We agree that the statute does not specifically state that the Tax Claim Bureau may not grant a four-year option, but Spruce Creek's interpretation of the Tax Law that the absence of a prohibition against the granting of such an option allows the bureau to so act is entirely incorrect. The law is precisely to the contrary. Absent the legislative authority to grant options of this nature, the bureau has no power to so act, and if they do, their action is a nullity. 1 Pa. C.S.A. §1921(b) provides:

> When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

A ". . . required rule of statutory construction provides that in ascertaining legislative intent, the

> practical results of a particular interpretation may be considered." *Lehigh Valley Co-op. Farmers v. Com., Etc.*, 498 Pa. 521, 447 A.2d 948, 960 (1982).

The practical result of Spruce Creek's four-year option with use of the realty and the extraction of coal is a leasehold.

Moreover, as was stated at page 9 of this Court's Opinion and Order of September 27, 1985,

> There is no authority in the act for the Tax Claim Bureau to compromise any present or future tax assessment of the respective taxing districts. Thus, any argument as to the adequacy of the Fifty Thousand ($50,000.00) Dollars annual payments to the respective taxing districts in lieu of taxes is irrelevant.

Spruce Creek's post-trial motion must be denied.

No. 1 C. D.
Date of Filing in Trial Court:
December 27, 1985

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NOTICE OF DOCKETING APPEAL

A Notice of Appeal, a copy of which is enclosed, from an order of your court has been docketed in the Commonwealth Court of Pennsylvania. The docket number in the Commonwealth Court is endorsed on this notice.

Under Chapter 19 of the Pennsylvania Rules of Appellate Procedure the Notice of Appeal has the effect of directing you to transmit the certified record in the matter to the Prothonotary of the Commonwealth Court.

The complete record, including the opinion of the trial judge, should be forwarded to the Commonwealth Court within 40 days of the date of filing of the Notice of Appeal. Do not transmit a partial record.

Pa. R.A.P. 1921 to 1933 provides the standards for preparation, certification and transmission of the record.

The address to which you are to transmit the record is set forth on page 2 of this notice.

NOTICE TO COUNSEL

A copy of this notice is being sent to all parties or counsel indicated on the the proof of service accompanying the Notice of Appeal. The appearance of all counsel has been entered on the record in the Commonwealth Court. Counsel have 30 days from the date of filing of the Notice of Appeal to file a praccipe to withdraw their appearance pursuant to Pa. R.A.P. 907(b).

If any motions or applications are filed pursuant to the appellate rules you must include with such motions or applications a proposed order. Any answers filed pursuant to said motions must also include a proposed order. Failure to comply may result in the Court returning the motion or answer to you for compliance. The Commonwealth Court docket number must be on all correspondence and documents filed with the Court.

The address to which you are to transmit documents to this Court are set forth on Page 2 of this notice.

Address *all written* communications to:

Office of the Prothonotary
Commonwealth Court of Pennsylvania
P. O. Box 11730
Harrisburg, PA 17108

Filings may be made *in person* at the following address (except on Saturdays, Sundays and legal holidays observed by Pennsylvania Courts) between 9:00 a.m. and 4:00 p.m.

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Sixth Floor
South Office Building
Harrisburg, PA 17120
(717) 787-5884

Pleadings and similar papers (but not paperbooks or certified records) may also be filed as follows:

Office of the Prothonotary
Commonwealth Court of Pennsylvania
Filing Office
Room 2050
Old Federal Courthouse
Ninth and Chestnut Streets
Philadelphia, PA 19107
(215) 351-5742

The hours of the Philadelphia Filing Office are 9:00 a.m. to 4:00 p.m.

Under Pa. R.A.P. 3702, writs or other process issuing out of the Commonwealth Court shall exit only from the Harrisburg Office and shall be returnable thereto.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

TREMONT TOWNSHIP,
PINE GROVE AREA
SCHOOL DISTRICT,
MINERSVILLE AREA
SCHOOL DISTRICT, AND
REILLY TOWNSHIP,
Plaintiffs

v.

SCHUYLKILL COUNTY
TAX CLAIM BUREAU
AND SPRUCE CREEK
ENERGY COMPANY, INC.,
Defendants

No. S-515-1983

LANNY G. FELTY, ESQ.—For the Plaintiffs,
Tremont Township and Reilly Township
RICHARD A. ADAMS, ESQ.—For the Plaintiff,
Pine Grove Area School District
EDWARD E. KOPKO, ESQ.—For the Plaintiff,
Minersville Area School District
JOSEPH H. JONES, JR., ESQ.—For the Defendant,
Schuylkill County Tax Claim Bureau
RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek

ORDER OF COURT

McCLOSKEY, J.

AND NOW, this 27th day of September, 1985 at 1:52 p.m., after hearing and upon consideration of the pleadings and argument of counsel, it is hereby ORDERED that the respective plaintiffs' Petitions to Disapprove Sale are GRANTED, and the sale is disapproved.

BY THE COURT

s/ McCLOSKEY, J.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

TREMONT TOWNSHIP,
PINE GROVE AREA
SCHOOL DISTRICT,
MINERSVILLE AREA
SCHOOL DISTRICT, AND
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Plaintiffs

v.

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AND SPRUCE CREEK
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JOSEPH H. JONES, JR., ESQ.—For the Defendant, Schuylkill County Tax Claim Bureau
RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek

OPINION OF COURT

McCLOSKEY, J.

The defendant, Spruce Creek Energy Company, Inc., on March 24, 1983, entered into a "Private Land Sale Agreement" with the County of Schuylkill represented by the ten majority members of the Schuylkill County Tax Claim Bureau. On March 26, 1983 the Tax Claim Bureau sent notices of the proposed sale to the taxing districts in which the instant pieces of and

interests in realty lie. These taxing districts, the plaintiffs herein, subsequently filed their respective petitions to this Court to disapprove the instant sale.

These respective petitions were consolidated on May 18, 1983, per the Honorable Donald D. Dolbin, Judge of this Court. After extensive pre-hearing litigation, testimony was offered at hearing held December 18, through 21, 1984 and on February 15, 1985. All parties have submitted memoranda. The matter is now ripe for disposition.

The defendants entered into their "Private Land Sale Agreement" for the purchase by Spruce Creek of deep coal reserves located five hundred (500') feet below the surface of various pieces of realty located in the plaintiff taxing districts. At the time Spruce Creek first took an interest in the premises which are the subject of the agreement at issue, these premises and others were subject to a "Coal Exploration Lease Agreement" between the Schuylkill County Commissioners and the New Boston Coal Company. While these premises were subject to that agreement, Spruce Creek made several written proposals and held several meetings with county representatives.

The negotiations were not fruitful. Spruce Creek then initiated suit in the Federal District Court for the Eastern District of Pennsylvania against Schuylkill County and others alleging violation of the anti-trust laws of the United States. The suit was settled on March 10, 1983, by stipulation of the parties to the federal suit. These parties included the then majority of Schuylkill County Commissoners and the instant defendants, Spruce Creek and Schuylkill County Tax Claim Bureau. The stipulation provided that within twenty (20) days of the settlement, Schuylkill County and the Schuylkill County Tax Claim Bureau were to enter into an option agreement with Spruce Creek for 6572.35 acres in Tremont and Reilly Townships for an aggregate sales price of $2,190,000.00

The agreement at issue, which plaintiffs' contend is an option to purchase, provides, inter alia:

1) that Spruce Creek amicably settled its action against Schuylkill County and the Schuylkill County Tax Claim Bureau in United States District Court for the Eastern District of Pennsylvania (*Spruce Creek Energy Company, Inc., et al. v. Schuylkill County, et al.*, 82-5198);

2) that Spruce Creek pay to Schuylkill County Tax Claim Bureau the sum of Sixty Thousand ($60,000.00) Dollars at the agreement's execution ($50,000.00 of which to be paid to the respective taxing districts);

3) that Spruce Creek has the

> exclusive right and option, pursuant to 72 P.S. §5860.614, for a period of four (4) years . . . to purchase and mine let the following estate in land, Reserves and associated rights in and to the overlying surface thereof for a total price of Two Million One Hundred and Ninety Thousand Dollars ($2,190,000.00);

4) that the realty interests which Spruce Creek intends to purchase consist of

> All right, title and interest in and to all that unsevered and unextracted coal estate situated below five hundred (500) feet of the surface of the Targeted Tracts described in Schedule "A", with the unfettered right, at Grantee's sole expense and discretion, to explore, test for, locate, extract, remove, possess, process and dispose of such coal by any method (other than surface mining) and in any form, without further compensation to GRANTOR, along with ancillary surface rights and easements supportive of the aforementioned activities, as more fully described in paragraph 16 hereinafter, upon those of the Targeted Tracts whose surface is equitably owned by GRANTOR now or, as to newly-acquired surface only, at the time of GRANTEE'S

execution of its option hereunder (hereinafter "Purchased Assets");

5) that Spruce Creek agrees to make annual payments of Fifty Thousand ($50,000.00) Dollars in lieu of the current real estate taxes;

6) that Spruce Creek agrees to pay Ten Thousand ($10,000.00) Dollars to the County

in its corporate, governmental capacity rather than as Trustee or agent for the tax-delinquent lands constituting the Purchased Assets;

7) that the Schuylkill County Tax Claim Bureau prepare deeds on the instant realty to Spruce Creek and that these deeds be held in escrow by the Tremont National Bank & Trust Company of Pennsylvania pending closing;

8) that Schuylkill County provide Spruce Creek with certain easements over the surface of other lands held by the County and to be acquired by the County and that Spruce Creek be granted further rights to build roads, bridges, erect shelters, office trailers on land owned by the County not subject to the instant sale and also on land not yet owned by the County;

9) that in the event a court of competent jurisdiction would disapprove the sale, Spruce Creek could either rescind the agreement upon notice to Schuylkill County with full refund of all payments made minus the Ten Thousand ($10,000.00) Dollars payment which Schuylkill County would retain, or pay the minimum purchase price, and/or comply with the terms of sale imposed by the Court; and

10) that if the court confirms the sale, Spruce Creek's obligations shall commence to run immediately.

DISCUSSION

The authority of the defendant, Schuylkill County Tax Claim Bureau to sell the instant realty flows from the Pennsylvania Real Estate Tax Sale Law (72 P.S.

§5860.101 et seq.). Commentary hereinafter on "the act" refers to the Pennsylvania Real Estate Tax Sale Law. "The power given by the act carries with it the responsibility of seeing that its conditions are complied with." *In re Tax Claim Bureau of Chester County,* 208 Pa.Super. 384, 222 A.2d 602, 604 (1966). Thus, the agreement must be examined to determine its compliance with the act.

The instant pieces of realty were not sold at their respective prior public sales because of insufficient bids. Thus, they are proper subjects for private sale pursuant to Section 613. This section also gives the petitioners as the corporato authorities of the taxing districts in which the instant pieces of realty lie the right to petition this Court to disapprove the sale.

An option to purchase is a right, without obligation, to accept an offer under the terms and conditions of the option agreement. It is not a sale until exercised. The granting of an option is not the exercise or use of the power to sell, but is a suspension of it. Therefore, unless the act expressly gives the right to so act, one who holds land in trust for sale has no power to grant an option. See *Hickok v. Still,* 168 Pa. 155, 31 A. 987 (1895).

Defendants contend that their agreement is made pursuant to Section 614 which defines option sale procedure. Section 614 provides:

> (a) The bureau shall have the right to accept *option money to bind the private sale* of any such property at the price offered therefor, which shall be credited to the purchase price when the sale is effected, or be retained for the use of the taxing districts, if the purchase price is not paid over. But if the purchase price is not approved or confirmed, as hereinbefore provided, and the sale is not consummated for that reason, the option money shall be returned to the prospective purchaser.

> (b) Before a petition is presented to court for a subsequent sale, as herein provided, the bureau shall have the *right to accept option money from any person who agrees to bid a certain agreed price for the property at the sale*, and such money shall be credited to the purchase price, if such person purchases the property at the sale at a price not less than the agreed price. If said person does not bid the amount agreed upon, or more, or if the purchase price is not paid over, then the option money shall be retained for the use of the taxing districts. But if the property is sold to any other bidder for a price in excess of the agreed offer, the option money shall be returned to the person having deposited the same. (emphasis added)

Section 614 provides the Tax Claim Bureau with two situations in which it may accept money. One, is to bind a sale after a private bid has been accepted. The second, is to guarantee a minimum bid at a subsequent public sale. The Tax Claim Bureau has the authority to hold option money only until the Court acts on the sale and no longer. If the Court approves the sale, settlement must promptly occur. Should the purchaser fail to make prompt settlement, the option money is forfeited. When the Court disapproves a sale, the option money is to be returned to the purchaser. This option procedure was intended to protect the taxing districts. This interpretation is in accordance with the Statutory Construction Act of 1972 (1 Pa. C.S.A. §1501 et seq.) which states at Section 1922(5) "That the General Assembly intends to favor the public interest (taxing districts) as against any private interest (Spruce Creek)." The alleged option is for the benefit of Spruce Creek (a private interest) and not the taxing districts.

Since the purpose of the act is ". . . to protect local government against willful, persistent, long-standing delinquencies." *Huhn v. Chester County*, 16

Pa.Cmwlth. 98, 328 A.2d 906, 908 (1974) and ". . . to provide speedier and more efficient procedures for enforcing tax liens . . ." *Povlow v. Brown*, 12 Pa.Cmwlth. 303, 315 A.2d 375, 377 (1974), this Court cannot find that the legislature intends to allow the Tax Claim Bureau as trustee (72 P.S. §5860.702) the power or authority to grant a four-year option, when the act specifically limits the leasing power of the trustee to one year.

> The property turned over to it, as provided in the preceding section, shall not be subject to redemption and until finally sold, as hereinafter provided, the bureau shall manage and control the property for the trustee county with power, (a) to lease the property for a period not exceeding one (1) year . . .

The fact that the statute grants the bureau no power to lease in excess of one (1) year is indicative of the intention of the legislature not to encumber land for a period in excess of that period so that it would be readily available for sale. To find that the legislature intended the bureau to have the power to grant options for unlimited periods while restricting the granting of leases would be totally inconsistent. This Court finds that it was the intention of the legislature to enact a procedure which would encourage the trustee to make every effort to promote the sale of land held by the bureau and thus put it back on the tax rolls of the respective taxing districts.

Section 702 further provides that ". . . any such lease may be on a royalty basis for the purpose of extracting any minerals . . ." However, the act is silent as to the Tax Claim Bureau's power to combine its limited leasing with option powers. The act makes no provisions for this type purchase agreement which the defendants chose to call a "Private Land Sale Agreement."

> . . . a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a lease of the thing to be possessed. *Offerman v. Starr*, 2 Pa. 394, 396 (1845).

The instant agreement appears to be a lease, authorized by the act, for Spruce Creek was granted the right to use and explore the land for four (4) years in exchange for four (4) annual Fifty Thousand ($50,000.00) Dollar payments.

For the above reasons we find that the option and/or lease provision is in violation of the act.

Section 207 provides for the reimbursement to the county for costs expended on the sale and Section 202 for the compensation of the county personnel. The act makes no provision for the County to accept any other compensation. Section 205 directs the Tax Claim Bureau to pay the sale price or management moneys to the "respective taxing districts." All proceeds of a sale must pass to the taxing districts. See *Richards v. County of Schuylkill*, 399 Pa. 522, 161 A.2d 26 (1980). For the County to receive the additional benefit of a Ten Thousand ($10,000.00) Dollars payment is beyond the act. Moreover, the County under the instant agreement would receive as additional benefit the amicable settlement of the defendants' suit in Federal District Court. The taxing district of the County of Schuylkill cannot receive compensation in excess of that provided by legislative mandate (72 P.S. §5860.205) nor can it exclude the other respective taxing districts, the plaintiff's herein, from their right to recover tax delinquencies from the sale or management of the instant realty.

The defendant Tax Claim Bureau acts as the "agents" of the taxing districts (72 P.S. §5860.208) and the County holds the instant realty as trustee (72 P.S. §5860.702). The only valid consideration for entering into a private sale by the trustee is to recoup as much of the past due taxes as is reasonable and proper under the

circumstances. This Court finds that there are other considerations, to wit: 1) the Ten Thousand ($10,000.00) Dollar payment to the County; and 2) the settling of the federal district court action in which the plaintiffs herein, the taxing districts, were not parties thereto. The provisions for the settling of the suit were meant for and could only benefit the defendant Tax Claim Bureau and the County of Schuylkill at the expense of the plaintiff taxing districts.

There is no authority in the act for the Tax Claim Bureau to compromise any present or future tax assessment of the respective taxing districts. Thus, any argument as to the adequacy of the Fifty Thousand ($50,000.00) Dollar annual payments to the respective taxing districts in lieu of taxes is irrelevant.

> Section 102 of the act defines the term "property", real property which shall include a mobile home or house trailer permanently attached to land or connected with water, gas, electricity or sewage facilities, subject to a tax lien or against which a claim is being or has been filed as a lien. "Property", includes both seated and unseated lands.

The act makes no provisions for the sale of a nonvested future interest. Thus, the defendant Tax Claim Bureau and the then county commissioners had no authority under the act to agree to convey easements to the defendant Spruce Creek over land not yet owned by the County, or land owned by individuals or corporations not party to their "Private Land Sale Agreement".

Additionally, Section 515 of the act provides for the procedure to be followed in the preparation and delivery of deeds on realty purchased subject to the act. The early preparation of deeds and their "escrow" possession by the Tremont National Bank is beyond the scope of the act.

The defendant, Schuylkill County Tax Claim Bureau and the then majority Schuylkill County Commissioners exceeded their authority under the act specifically: Section 614 which outlines a limited option procedure which was not followed by the defendants; Section 702 which allows leases for only one (1) year; Section 207 and Section 202 which do not authorize the Ten Thousand ($10,000.00) Dollar payment to the County or the settling of the Federal District Court action; Section 102 which does not allow easements to be granted over land not yet owned by the County; and Section 515 which does not authorize the early preparation of deeds or for deeds to be held in escrow.

> The right to make a sale of real estate for unpaid taxes is wholly statutory and hence the necessity, in order to give validity to the sale, the provisions of the statute must be observed. *Hickey and Hickey v. Chalfant*, 20 Fay.L.J. 101, 105 (1957).

The "Private Land Sale Agreement" as entered into by the defendants is violative and ultra vires of the Real Estate Tax Sale Law of this Commonwealth, and for that reason the sale must be disapproved even though certain objectives, such as the settling of a law suit, may be worthy. Thus, this Court will not address the issue of the adequacy of price or make a finding of a price below which this property may not be sold. We, therefore, enter the foregoing order.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

TREMONT TOWNSHIP, PINE GROVE AREA SCHOOL DISTRICT, MINERSVILLE AREA SCHOOL DISTRICT, AND REILLY TOWNSHIP, *Plaintiffs*	No. S-515-1983
v. SCHUYLKILL COUNTY TAX CLAIM BUREAU AND SPRUCE CREEK ENERGY COMPANY, INC., *Defendants*	

LANNY G. FELTY, ESQ.—For the Plaintiffs, Tremont Township and Reilly Township
RICHARD A. ADAMS, ESQ.—For the Plaintiff, Pine Grove Area School District
EDWARD E. KOPKO, ESQ.—For the Plaintiff, Minersville Area School District
JOSEPH H. JONES, JR., ESQ.—For the Defendant, Schuylkill County Tax Claim Bureau
RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek

ORDER OF COURT

MCCLOSKEY, J.

AND NOW, this 27th day of August, 1984 at 3:05 p.m., upon consideration of the pleadings and memoranda of counsel and after argument before the Court sitting *en banc*, it is hereby ORDERED that the "Petition by Spruce Creek Energy Company for Change of Venue or for Recusal of the Judges of the Schuylkill County Court of Common Pleas" is DISMISSED.

BY THE COURT

s/ McCloskey, J.

COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY—CIVIL-LAW

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JOSEPH H. JONES, JR., ESQ.—For the Defendant, Schuylkill County Tax Claim Bureau
RICHARD L. CAPLAN, ESQ.—For the Defendant, Spruce Creek
Before HEFFNER, P.J., LAVELLE, MCCLOSKEY, DOLBIN and RUBRIGHT, JJ.

OPINION OF COURT

MCCLOSKEY, J.

The plaintiffs are municipalities who challenge the propriety of a sale by the defendant, Schuylkill County Tax Claim Bureau to the defendant, Spruce Creek Energy Company (Spruce Creek). Spruce Creek has filed a petition for change of venue or for recusal of all the judges of the Court of Common Pleas of Schuylkill County. The pleadings are closed, the parties have filed

memoranda by their respective counsel, and argument has been heard by the Court sitting *en banc*.

Spruce Creek contends in this non-jury case in Paragraph No. 16 of its petition

> ". . . Spruce Creek believes that no judge of this County is capable of rendering a decision which will appear to the public and to the litigants, in light of the unequivocal referendum result, as evenhanded and independent."

It appears to be the contention of Spruce Creek that electoral popularity is controlling in judicial decisions. With this we cannot agree. Most historians opine that it is the ability of the courts in this country to follow the law and render a decision in accordance therewith without regard to the then popular consensus that separates our judicial system from other countries.

The Code of Judicial Conduct which is the standard for guiding the ethics of judges in our great Commonwealth provides at Canon 3 A.

> *Adjudicative Responsibilities*
>
> (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, *public clamor*, or *fear of criticism*. (emphasis supplied)

For this Court to recuse itself because an issue before it is of some prominence in the community would be tantamount to an admission that we are incapable of acting in the manner which judges are sworn to do.

Canon 3 C. provides the guides by which a judge should decide on recusal. It provides as follows:

> (1) A judge should disqualify himself in a proceeding in which his *impartiality* might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding. . . .

A cursory glance at this canon indicates that for it to be triggered, there must be an indication of: personal bias; prejudice; knowledge; legal association, financial interest; or family relationship with one of the parties.

lawyers, or material witnesses. In the instant case all parties admit there exists no prohibited relationship or bias.

The legal precedents counsel for the corporate defendant cites all arise out of controversies in which the judges themselves, their families, judicial colleagues or former legal colleagues had an interest in or contact with one or more of the litigants or their counsel. It is admitted by Spruce Creek that no member of this Court has any interest, direct or indirect, in the instant sale.

But even if we accept, *arguendo*, this contention, it does not lead to the irrebuttable conclusion that Spruce Creek will receive an unfavorable ruling. The issue presented by the plaintiffs is not the propriety of Spruce Creek's proposed use of the land, but the propriety of the sale. Moreover, should Spruce Creek receive a favorable ruling in the instant dispute, the plaintiffs and any other interested party are still free to challenge the propriety of Spruce Creek's proposed use before the appropriate tribunal.

In artful argument counsel for the corporate defendant paints the portrait of a two-headed Chimera: a judiciary which fears the vengeful malice of disappointed litigants and a know-nothing electorate in a retention election. It would be dishonorable for this or any other Court to take flight from this monster of fantasy. If issues of controversy and public passion cannot be decided in the Courts, where are they to be decided?

It is not uncommon in our judicial system for judges to rule on issues which have raised a public clamor. Each time a judge suppresses evidence which may cause a defendant in a criminal proceeding to go free, he faces criticism. But in that issue he is not deciding the guilt or the innocence of the accused but a constitutional question of substance or procedure. Such is the instant dispute. Moreover, since demands for recusal can be used as an indirect means of attempting to choose the

judge who will sit. *United States v. Devlin*, 284 F.Supp. 477, 482 (1968), there is ". . . as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Wapnick vs. United States*, 311 F.Supp. 183, 184 (E.D.NY, 1969); *Rosen vs. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1968).

Here the issue is the propriety of the sale of county land, not the burning of anthracite coal under ground. Whether or not the burning of anthracite coal under ground will survive environmental assaults, zoning disputes, legislative assaults, or other challenges, is not an issue before this tribunal.

To grant the defendants' request would be an admission by this Court that no one can receive a fair or impartial hearing and decision because this Court is subject to outside influences. The Court is confident that it can and will live up to the Canons of the Code of Judicial Conduct and decide this controversy solely on the facts and the law before it.

President Judge Heffner, and Judges Lavelle, Dolbin, and Rubright join this Opinion.

SCHUYLKILL COUNTY TAX CLAIM BUREAU, et al., *Appellants*	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	
TREMONT TOWNSHIP et al., *Appellees*	NO. 1 C.D. 1986

ORDER

NOW, May 14, 1987, having considered appellants' joint application for reargument, said application is hereby denied.

BY THE COURT:

_____

P. J.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

May 15, 1987

Deputy Prothonotary—Chief Clerk

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

MARLENE F. LACHMAN, ESQ.
PROTHONOTARY

PATRICK TASSOS
DEPUTY PROTHONOTARY

December 8, 1987

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RE: Schuylkill County Tax Claim Bureau and Spruce Creek Energy Company, Inc. v. Tremont Township, Pine Grove Area School District, Minersville Area School District and Reilly Township
No. 465 E.D. ALLOCATUR DOCKET 1987

Dear Sirs:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"December 3, 1987.

Petition Denied.

Per Curiam".

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Lanny G. Felty, Esquire
Edward E. Kopko, Esquire
Richard A. Adams, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 465 E.D. Allocatur Docket 1987

SCHUYLKILL COUNTY
TAX CLAIM BUREAU
AND SPRUCE CREEK
ENERGY COMPANY, INC.,
Petitioners

v.

TREMONT TOWNSHIP,
PINE GROVE AREA
SCHOOL DISTRICT,
MINERSVILLE AREA
SCHOOL DISTRICT, AND
REILLY TOWNSHIP,
Respondents

APPLICATION FOR RECONSIDERATION OF DENIAL OF ALLOWANCE OF APPEAL

(From Order of Supreme Court dated December 3, 1987, served December 10, 1987, Supreme Court No. 465 E.D. Allocatur Docket 1987, denying Petition For Allowance Of Appeal Of An Order of Commonwealth Court dated March 5, 1987, Docket No. S-515-1983, affirming an interlocutory order of the Schuylkill County Court of Common Pleas and dismissing as untimely filed petitioners' appeal from the final judgment below).

February 1, 1988
Application Denied
Per Curiam

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Claim Bureau

CONSTITUTION

OF THE

UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TAXATION AND FISCAL AFFAIRS 72 P.S. §5860.613

§5860.613. Properties not sold because of insufficient bid may be sold at private sale

(a) At any time after any property has been exposed to public sale and such sale is not sold because no bid was made equal to the upset price, as hereinbefore provided, and whether or not proceedings are initiated pursuant to sections 610 through 612.1[1], the bureau may, on its own motion, and shall, on the written instructions of any taxing district having any tax claims or tax judgments against said property, agree to sell the property at private sale, at any price approved by the bureau. Notice of the proposed sale, stating the price and the property proposed to be sold, shall be given to each such taxing district and to the owner of the property. The corporate authorities of any taxing district, having any tax claims or tax judgments against the property which is to be sold or the owner may, if not satisfied that the sale price approved by the bureau is sufficient, within forty-five (45) days after notice of the proposed sale, petition the court of common pleas of the county to disapprove the sale. The court shall, in such case, after notice to each such taxing district, the owner, the bureau and the purchaser, hear all interested parties. After such hearing, the court may either confirm or disapprove the sale as to it appears just and proper. If the sale is disapproved, the court shall at the same time fix a price below which such property shall not be sold.

As amended 1973, Dec. 21 P.L. 442, No. 157, §2, imd. effective; 1981, Sept. 26, P.L. 274, No. 92, §6, effective Jan. 1, 1982.

[See main volume of text of (b)]

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[1] Sections 5860.610 to 5860.612-1 of this title.

PENNSYLVANIA RULES
OF
CIVIL PROCEDURE
As Amended Through July 7, 1986

Rule 227.1. Post-Trial Relief

(a) After trial and upon the written Motion for Post-Trial Relief filed by any party, the court may

(1) order a new trial as to all or any of the issues; or

(2) direct the entry of judgment in favor of any party; or

(3) remove a nonsuit; or

(4) affirm, modify or change the decision or decree nisi; or

(5) enter any other appropriate order.

(b) Post-trial relief may not be granted unless the grounds therefor,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and

Note. If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief.

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

(c) Post-trial motions shall be filed within ten days after

(1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or

(2) notice of nonsuit or the filing of the decision or adjudication in the case of a trial without jury or equity trial.

If a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion.

(d) A motion for post-trial relief shall specify the relief requested and may request relief in the alternative. Separate reasons shall be set forth for each type of relief sought.

(e) If a new trial and the entry of judgment are sought in the alternative, the court shall dispose of both requests. If the court directs the entry of judgment, it shall also rule on the request for a new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the request for a new trial.

(f) The party filing a post-trial motion shall serve a copy promptly upon every other party to the action and deliver a copy to the trial judge.

Adopted Oct. 19, 1983, effective Jan. 1, 1984. Amended April 23, 1985, effective July 1, 1985.

Rules of Court

OF THE

Twenty-First Judicial District

SCHUYLKILL COUNTY PENNSYLVANIA

Rule 227.1: Post-Trial Motions

(a) Motions for new trials, for judgment n.o.v., to take off non-suits, in arrest of judgment, and exceptions to a decision or adjudication in a non-jury proceeding with the reasons in support thereof, shall be in writing and shall be filed within ten days after verdict, non-suit or adjudication, or within such additional times as may be allowed by the Court during said ten-day period. Copies of such motion shall be given promptly to the Trial Judge, to opposing counsel, and notice thereof to the court stenographer.

(b) A motion for new trial which alleges after discovery evidence, misconduct of a party or the jury or any matter of fact which was not brought out at the trial must be supported by affidavit stating the after discovery, the names of the witnesses in support of the motion, the substance of their expected testimony, and the party's belief of its sufficiency to change the verdict; otherwise, such reasons will be disregarded.

(c) The Court may call a post-trial conference of the parties in effort to seek agreement as to which portions of the record shall be transcribed. Only those portions of the record which relate to the allegations of error claimed in the motion shall be transcribed.

(d) Briefs of the parties shall be prepared from the trial notes of counsel unless the Court directs that the stenographic record of the case be transcribed.